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In The

Supreme Court of the United States

October Term, 1997

S.A. LUDSIN & CO.,

Petitioner,

vs.

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a government contractor seeking documents pursuant to the Freedom of Information Act ("FOIA") in furtherance of its government contract categorically precluded from receiving a "public interest" fee waiver by virtue of its status as a "commercial requester" where: (a) the contract itself is in the public interest; (b) the benefit to the public in providing the documents outweighs any commercial interest of the contractor; (c) the documents were for public dissemination and would have contributed significantly to the public's understanding of governmental operations and activities; and (d) the government acknowledged that it was planning to make certain of the information requested available to the public at no charge via the Internet and had previously made certain information available at no charge?

2. Is the public dissemination of appraisals of real estate held as loan collateral by the Small Business Administration ("SBA") likely to contribute significantly to the public's understanding of the SBA's operations and activities so as to justify a fee waiver under the FOIA?

3. Although articulating a *de novo* standard of review, in granting the SBA summary judgment, did the reviewing court in effect change the standard of review with undue deference to the SBA's fee-waiver determinations, by failing to fully and independently consider the administrative record below and by resolving factual disputes in the SBA's favor?

STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all parties. Petitioner S.A. LUDSIN & CO., d/b/a S.A. Ludsin & Co. ("Ludsin") does not have any parent companies or nonwholly owned subsidiaries.

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Petitioner Ludsin prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, dated March 26, 1998, is Appendix ("App.") A to this Petition. (App. A at 1a.) The Opinion and Order of the United States District Court for the Southern District of New York (Andrew J. Peck, Magistrate Judge), 96 Civ. 2146, 1997 U.S. Dist. LEXIS 8617 (S.D.N.Y. June 18, 1997) and the Judgment dated June 20, 1997, are Appendix B to this Petition. (App. B at 6a.) The Decision of the SBA dated July 11, 1996, is Appendix C to this Petition. (App. C at 25a.)

STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit for which review is sought was entered on March 26, 1998. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

5 U.S.C. § 552(a) provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for

records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining which such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that --

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

* * *

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

* * *

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

13 C.F.R. § 102.8 provides in pertinent part:

What fees will SBA charge?

(a) *Basic fees.* (1) For manual record search. SBA will charge $18 per hour.

(2) *For computer record searches.* SBA will charge the actual costs.

(3) *For review and disclosure determinations.* SBA will charge $18 per hour.

(4) *Duplication.* SBA will charge 10 cents per page for photocopy duplication, and the actual cost of reproduction for other methods.

(5) *Certifying records.* SBA will charge actual costs.

(6) *For requested special types of delivery other than first-class mail.* SBA may charge the actual cost.

* * *

(d) *Commercial Requester.* If you are a commercial requester you must pay all the basic fees set forth in paragraph (a) of this section. A commercial requester is anyone seeking information for commercial, trade, or profit interests of the requester or someone he or she is trying to help.

(e) *How does SBA determine what category of requester I am?* The SBA office processing your request will determine the appropriate category. If you are not a commercial requester, you must show us what category of requester you are.

* * *

(o) *Reduction of fees in the public interest.* If SBA determines that disclosure of the information

you seek is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and that you are not seeking the information in your own commercial interests, SBA may waive or reduce the fee.

STATEMENT OF THE CASE

This case arises from the SBA's arbitrary and capricious refusal to process Ludsin's FOIA request unless and until Ludsin paid a fee of $10,250.

On June 12, 1995, Ludsin entered into a contract with the SBA to market and sell a portfolio of SBA "Collateral Purchased" real estate (COLPUR) consisting of 470 properties valued at under $100 million.[1] (SA-38.)[2] This contract resulted from a successful innovative pilot project initiated by Ludsin with the SBA, which, according to the SBA, offered the "SBA a unique and aggressive way to market its acquired assets" (SA-37) and was "both worthwhile and cost effective." (SA-37.) Although the SBA had attempted an internal effort to sell its COLPUR to the public through its electronic bulletin board system, it sought "a more aggressive market focus and approach where the sale of SBA's COLPUR would be directed toward investors and businesses in the financial community." (SA-37.)[3]

---

1. COLPUR is collateral purchased by the SBA or acquired by the SBA through foreclosure. *See* National Association of Government Guaranteed Lenders, Inc., *SBA Loan Liquidation* (1997).

2. SA refers to the Supplemental Appendix of Defendant-Appellee SBA in the Second Circuit.

3. Ludsin made an unsolicited proposal to the SBA, which led to the contract. Unsolicited proposals

(Cont'd)

Pursuant to the contract, Ludsin was to

> provide an automated sales and tracking system for COLPUR, and the necessary technical and marketing assistance to maintain and expand the program for selling SBA's COLPUR.

(SA-37.). The primary focus of these activities was to "market and sell SBA COLPUR properties through the Bloomberg electronic system to a wide pool of potential purchasers worldwide" (SA-37)[4] in an effort to "augment any existing sales efforts planned within SBA." (SA-37.) Ludsin was to receive a negotiated commission on the sale of properties, projected to range between 2% and 6%, with the final determination resting with the agency. (SA-38.) The cost of the contract to the SBA (apart from commissions) was not to exceed $50,000 over the one-year life of the contract (subject to extension by the SBA), which $50,000 was refundable out of any commissions. (SA-40.)

(Cont'd)

> allow unique and innovative ideas or approaches that have been developed outside the Government to be made available to Government agencies for use in accomplishment of their missions. Unsolicited proposals are offered with the intent that the Government will enter into a contract with the offeror for research and development *or other efforts supporting the Government mission*. . . .

48 C.F.R. § 15.603. (Emphasis added.)

4. The Bloomberg Financial Market is a global distributor of financial information services, providing news, data, and analysis of the financial markets and businesses to over 140,000 users in 91 countries. *See Bloomberg Online: The Bloomberg service* (visited June 23, 1998) <http://www.bloomberg.com/products/prod_terminal02.html>.

By letter dated January 8, 1996, Ludsin made a FOIA request for various documents and information relating to the properties, including appraisals and descriptions, "in order to accomplish the sale of the SBA's COLPUR real estate portfolio on the Bloomberg Financial Markets System ('Bloomberg')." (SA-30.) As Ludsin explained,

> [t]his nonperforming portfolio can only be marketed if we have the appraisals or the property descriptions contained in the original loan documentation . . . [to] be able to scan that information into the Bloomberg. The ability to print out this critical information from the Bloomberg will also provide a due diligence document for investors on a cost effective basis. . . .

(SA-30.)

At the direction of the SBA, by letter dated January 29, 1996, Ludsin broke down his January 8 FOIA request into three categories. (SA-27.) By letter dated February 20, 1996, the SBA expressed its willingness to provide property descriptions from the appraisals "to help sell the COLPUR properties." (SA-67.) In response, Ludsin reiterated the need for the *full* appraisals in order to consummate a potential transaction, to attract other buyers, and to provide full information to the potential marketplace. Ludsin further stated that

> [s]ince your SOP requires annual appraisals completed by new appraisers annually, I expect to receive those appraisals to scan into the Bloomberg. . . . Anything less than the full appraisal I would deem to be a denial of the first part of my FOIA request and I will appeal.

(SA-69.)[5]

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5. *See* SBA, *Loan Liquidation and Acquired Property SOP* 50:51:1, at 234 (1993). The 1993 SOP was effective at all relevant times.

By letter dated February 22, 1996, Ludsin appealed the apparent denial of his FOIA request. His appeal stated:

> Disclosure of the documents I requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. The ability to market the COLPUR assets and raise revenues through the sale of the COLPUR assets is in the public interest. Although I am a commercial entity with a government contract, the information I requested enhances the likelihood of a sale and the creation of revenues for the U.S. Government.

(SA-72.)

On February 26, 1996, the SBA acknowledged Ludsin's FOIA appeal, and advised him that

> [w]e have contacted the Office of Borrower and Lender Services concerning the pertinent information. Upon the completion of our appellate review, disclosure determinations will be forwarded to you.

(SA-75.) On March 5, 1996, the SBA informed Ludsin that it deemed appellate review of his FOIA request premature until the initial processing of his request had been completed and disclosure determinations made. (SA-77.)

By letter dated March 11, 1996, the SBA acknowledged that it had previously agreed to provide property descriptions and appraisals without charge, "since we agreed that it would be advantageous to have more information on the Bloomberg," (SA-81) and further acknowledged that this information "is

routinely collected by SBA" (SA-82.) However, the SBA now complained for the first time that providing this material imposed a "significant burden on Agency staff." The SBA further informed Ludsin that it was "suspending any additional use of resources in providing property descriptions and photographs without charge," and that *it would not even process his FOIA request unless Ludsin paid the SBA $10,250 -- the purported cost of providing the appraisals*. (SA-82.)

On March 19, 1996, the SBA again reminded Ludsin that it viewed his FOIA appeal as "premature" and advised Ludsin that it was awaiting his response to the fee demand before proceeding further. (SA-84.) By letter dated March 25, 1996, Ludsin expressed his willingness to pay the $10,250 "in the interest of seeing this contract to its successful completion," and proposed that this amount be paid out of any commissions upon a sale of the properties. (SA-86.) That same day, Ludsin, acting *pro se*, filed a complaint in the United States District Court for the Southern District of New York, challenging, *inter alia*, the imposition of the $10,250 fee. (SA-2.)

On March 27, 1996, the SBA rejected Ludsin's proposal that the $10,250 fee be paid out of commissions, claiming that it was unauthorized under FOIA or the SBA's regulations. (SA-88.) By letter dated March 29, 1996, Ludsin appealed the imposition of the fee, stating:

> The appraisals were sent to me without imposition of fees, until I filed my 2 formal FOIA requests. Although the SBA may not deem the full appraisal a requirement of my contract performance, I was hired to innovatively market the COLPUR portfolio and the use of the appraisals to be scanned into the Bloomberg Financial Markets System creating an outreach to 170,000 users worldwide with a cost effective due

> diligence document is a requirement of my contract performance.

(SA-91.)

On April 3, 1996, Ludsin submitted a more detailed explanation to the SBA as to why the imposition of a fee was inappropriate.[6] On April 25, 1996, the SBA suspended Ludsin's fee-waiver appeal due to the "intervening lawsuit." (SA-93.) By Stipulation and Order dated June 17, 1996, the parties agreed that the SBA would rule on Ludsin's fee-waiver appeal. (SA-6.)

On July 11, 1996, the SBA denied Ludsin's appeal. The SBA concluded:

> In light of the fact that the information which you seek is not likely to contribute significantly to the public's understanding of the operations or activities of the government (since it pertains exclusively to the description and value of property), and that such disclosure will be primarily in your commercial interest (as is clearly demonstrated by the subject contract awarded to you), SBA must affirm the original determination that a waiver of the processing fees in this matter is not appropriate.

(App. C. at 25a.)

Ludsin was "assured," however, that upon payment of the $10,250 fee,

> the requested documents will be assembled, and the requested information will be released to you except

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6. Significantly, this memo was excluded from the SBA's submission of the administrative record to the district court. *See* fn. 10 *infra.*

> for those portions related to the properties' valuation, which is confidential and privileged under exemptions 4 and 5 of the Act.

(App. C at 26a.)

By Stipulation and Order filed September 30, 1996, following judicially sponsored settlement efforts, the SBA agreed to provide to Ludsin, at no charge,

> appraisals, in their entirety except for dollar valuation information (which will be redacted) of the entire current SBA Collateral Purchased (COLPUR) real estate portfolio, in the SBA's possession, by January 2, 1997.

(SA-8.)

However, the SBA failed to comply with its obligations under the Stipulation and Order (having refused to provide appraisals with respect to approximately 110 properties). The district court then set a briefing scheduled for the SBA's proposed summary judgment motion. (App. B at 13a-14a, fn. 4.)

On June 18, 1997, the district court granted the SBA's motion for summary judgment, finding that Ludsin had failed to satisfy either prong of 5 U.S.C. § 552(a)(4)(A)(iii), which provides for a fee waiver upon a determination that the disclosure of the information requested is

> in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Specifically, the district court held that:

> The subject matter of Ludsin's FOIA request, appraisals of SBA property, does not in any readily apparent way contribute to the public's understanding of the operation or activities of the government. Further, it is clear from Ludsin's contract with the SBA and commercial nature of his request that Ludsin's motive is his private financial gain. These two factors weigh against a fee waiver. Finally, although placing the appraisals on the Bloomberg network may allow their wide dissemination, the appraisals' subject matter makes this factor irrelevant; if the subject matter does not concern the operations or activities of the government, then a wide dissemination of the material will not contribute to the public's understanding of these matters.
>
> In short, while sale of this property would benefit the public treasury, that commercial interest (of the government and of Ludsin) is not the "public interest" understanding of the operation of the government required for a FOIA fee waiver.

(App. B at 17a-18a.)

The district court further found that Ludsin's "status as a 'commercial' requester is beyond serious dispute." (App. B at 22a.) While the district court held that there was "some support" for balancing Ludsin's commercial interest against the public benefit, it held that the balance did not favor Ludsin since the public benefit was "financial, not the public understanding of government operations that Congress defined as the 'public interest' to be considered in FOIA fee waiver requests." (App. B at 23a.)

In a Summary Order dated March 26,1998, the United States Court of Appeals for the Second Circuit affirmed, holding that Ludsin did not meet the first prong of the FOIA fee waiver test:

> [Ludsin's] request for documents was not in the public interest. For the most part, Ludsin's submissions to the SBA merely paraphrased the language of the FOIA fee waiver provision, and such conclusory statements do not satisfy the statute. . . . His only substantive claim before the SBA was that disclosure would serve the "public interest" by creating revenue for the federal government by facilitating sale of COLPUR properties. However, FOIA permits fee waivers when the requested information is likely to contribute to public understanding of the operations and activities of government, not when it is likely to increase public revenue. . . .

(App. A at 4a.)

Because the Second Circuit found that Ludsin had failed the first prong of the FOIA test, it did not consider the second prong -- whether disclosure was "primarily in the commercial interest of the requester." (App. A at 4a.) Ludsin's other arguments on appeal were rejected summarily without explanation. (App. A at 4a.)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING PUBLIC INTEREST FEE WAIVERS UNDER FOIA.

This case presents two narrow, yet important issues of first impression under FOIA, each deserving of consideration by the Supreme Court.

First, does a request for public dissemination of information contained in appraisal reports about SBA COLPUR property contribute to the public's understanding of governmental operations and activities where the information can be used both by those actually bidding on properties and those interested in learning about value of SBA collateralized real estate and its procedure for obtaining collateral?

Second, is a government contractor who seeks documents for public dissemination in order to perform a contract that will benefit the public precluded from receiving a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) simply because obtaining the requested documents will necessarily benefit the contractor as well? *Cf. Eudey v. Central Intelligence Agency*, 478 F. Supp. 1175, 1176 (D.D.C. 1979) (plaintiff's entitlement to fee waiver presented "a narrow question but an important one to members of the public and to government agencies").

Both the district court and the court of appeals answered these questions in the negative, despite the fact that the SBA had already determined that it was in the public interest to liquidate its COLPUR portfolio, that it was in the public interest to contract with Ludsin to aggressively market that portfolio and that it was

in the public interest to make the appraisals available to the public free of charge via the Internet. Clearly, it was in the public interest for the SBA to make these appraisals available to Ludsin without charge to provide the public with information concerning the SBA's asset liquidation program and maximize the SBA's return on the sale of its real estate assets. In concluding that it was not, the Second Circuit misconstrued the FOIA fee waiver provision in a manner wholly inconsistent with its language and purpose.

The questions presented in this Petition transcend the SBA and go to the core of the practical operation of FOIA. Indeed, the narrow reading embraced by the Court of Appeals largely makes FOIA unavailable as a ready source of information to any government contractor. In so doing, it also turns upside-down the appropriate focus of inquiries about the way our government operates. Thus, the Second Circuit's order creates an inexplicable presumption that information can only be of limited value to a prospective purchaser, rather than of more general interest to the public at large insofar as it contains revealing information about the SBA and its collateralization practices and procedures.

A person making a FOIA request is entitled to a waiver or reduction of fees

> if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii). Congress adopted the fee waiver provisions in 1974 to ensure that "the public would benefit from any expenditure of public funds for the disclosure of public records." *Ely v. United States Postal Servs.*, 753 F.2d 163, 165 (D.C. Cir.) (citing legislative history), *cert. denied*, 471 U.S. 1106

(1985). Congress further intended that the "public interest standard be liberally construed" and that "fees not be used as an obstacle to disclosure of requested information," *Eudey*, 478 F. Supp. at 1177 (citing legislative history). The fee waiver provisions were amended in 1986 "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting legislative history); *accord Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851 (D. Colo. 1994). *See also* 132 Cong. Rec. H. 9455 (Oct. 8, 1986) ("As with the fee waiver standard that is superseded, the new fee waiver standard should be liberally construed in order to encourage full and complete disclosure of information in the possession of the government that does not require withholding for a public or private interest.")[7]

A. The Disclosure of the Appraisals Was in the Public Interest.

In determining whether disclosure is in the "public interest," the courts of appeals that have interpreted the 1986 fee waiver

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7. Prior to its amendment in 1986, FOIA provided for a fee waiver when the agency determined that such a waiver was "in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C § 552(a)(4)(A)(1985) *amended by* 5 U.S.C § 552(a)(4)(A)(iii) (1986). As the House Report noted in adopting the 1986 amendment:

> The deletion of the current language requiring fee waivers only when "furnishing the information can be considered as primarily benefiting the general public" is intended to emphasize that a request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.

132 Cong. Rec. H. 9455 (Oct. 8, 1986).

provision have considered relevant: (i) the subject matter of the requests; (ii) the ability of the requester to disseminate the information; and (iii) the motive for seeking disclosure. *See, e.g., Carney v. United States Dep't of Justice*, 19 F.3d 807 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994); *McClain v. United States Dep't of Justice*, 13 F.3d 220 (7th Cir. 1993); *Larson v. Central Intelligence Agency*, 843 F.2d 1481 (D.C. Cir. 1988); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1282. Until now, no court has considered whether a government contractor is precluded from receiving a fee waiver where documents are requested to facilitate performance of the contract.

The Second Circuit neither elaborated upon nor explained its conclusion that the appraisals Ludsin requested were not "likely to contribute to public understanding of the operations and activities of government." (App. A at 4a.) However, it is difficult to see how appraisals of the properties contained in the SBA's COLPUR portfolio could *not* shed light on the SBA's "operations and activities," *i.e.*, its liquidation program and lending practices. See 132 Cong. Rec. § 14270 (Sept. 30, 1986) (Sen. Leahy) ("the phrase 'operations and activities of the government' should be broadly construed. Agencies deal with private entities on a range of regulatory, enforcement, procurement and other activities, and records which cast light on those relationships should be routinely made available with a waiver. . . ."); *accord* 132 Cong. Rec. H 9455 (Oct. 8, 1986) (fee waivers must be granted when the "requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities. . . ; or otherwise confirms or clarifies data on past or present operations of the government.").

Moreover, the determination whether public understanding will be enhanced is an "objective" one:

> agencies are not permitted to make separate value judgments as to whether any information that would in fact contribute significantly to public understanding of government operations or activities is important enough to be made public.

See U.S. Dep't of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act* 432 (September 1997); *see also Ettlinger v. FBI*, 596 F. Supp. 867, 875 (D. Mass. 1984).

Indeed, the SBA's liquidation activities were the subject of a December 1991 United States General Accounting Office Report to the Chairman, Committee on Small Business, U.S. Senate. The Report was commissioned due to concern about whether the SBA was "properly managing loan collateral, especially for those loans in liquidation" and to determine whether the SBA's loan liquidation procedures "adequately protect the government's, and ultimately the taxpayer's, financial interests." Report at 1.

The Report concluded that the

> SBA is experiencing substantial losses in liquidating loans because (1) collateral is insufficient to cover the costs incurred when loans are liquidated and (2) SBA does not maximize recoveries on existing loan collateral.

Id. at 2. The GAO made numerous recommendations to the SBA regarding its management of loan collateral and liquidation procedures in order to improve its recoveries on defaulted loans.

Consequently, the information requested by Ludsin might well have been of interest to other financial real estate analysts, as well as to critics of the SBA who questioned the soundness and wisdom of its business decisions. Indeed, once the information was released and put on Bloomberg the potential audience would have been broad and substantial, far beyond only those who might seek to bid for the properties.

The public significance of the information requested by Ludsin was further confirmed by the SBA's acknowledgments to him that "it would be advantageous to have more information on the Bloomberg" (SA-81); that the appraisals are "routinely collected by SBA" (SA-82); and that "certain of the data which you seek eventually may be made available by the SBA to the general public via the Internet at no charge." (App. C at 26a.) Nonetheless, the Court of Appeals appears to have concluded, without explanation, that such interests cannot as a matter of law constitute information "likely to contribute significantly to the public understanding of the operations and activities of government." This is an unduly narrow and insupportable reading of the statutory words. In fact, it writes out of FOIA many otherwise permissible uses of such information.

Finally, contrary to the Second Circuit's holding, the fact that disclosure of the appraisals was likely to increase public revenue by facilitating the sale of COLPUR properties is a factor that should have militated in favor of granting a fee waiver, not against it. Not only is it absurd to permit the SBA to charge its own small business contractor over $10,000 to provide documents necessary to accomplish the SBA's goals -- effectively depriving Ludsin *and* the public of the documents -- it is inconsistent with federal policy:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect,

> insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises . . ., and to maintain and strengthen the over-all economy of the Nation.

15 U.S.C. § 631(a).

Here, Ludsin had displayed the type of imagination and enterprise that the SBA was supposed to encourage and support. Its insistence upon a fee, under the circumstances, smacked of bureaucracy personified and a studied disregard of the statutory purpose. Thus, the Second Circuit's summary conclusion that disclosure of the appraisals was not in the public interest was contrary to the important policies that are cornerstones of the FOIA framework.

B. The Disclosure of the Appraisals Was Not Primarily in Ludsin's Commercial Interest.

The Second Circuit did not reach the issue whether disclosure to Ludsin was "primarily in the commercial interest of the requester," the second prong of the fee waiver test. Contrary to the conclusion of the SBA and the district court, it plainly was not.

SBA regulations define a "commercial requester" as "anyone seeking information for commercial, trade, or profit interests of the requester. . . ." 13 C.F.R. § 102.8(d). The regulations further provide that the SBA may grant a fee waiver where disclosure is in the public interest and the requester is "not seeking the information in [its] own commercial interests." 13 C.F.R. § 102.8(o). To the extent the SBA regulations purport to eliminate

the requirement of 5 U.S.C. § 552(a)(4)(A)(iii) that the disclosure be "primarily" in the commercial interest of the requester, they are invalid. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (court may set aside administrative regulation "manifestly contrary to the statute" pursuant to which it was issued); *National Mining Assoc. v. United States Army Corps of Engineers*, Nos. 97-5099, 97-5112, 1998 WL 321064, at *11 (D.C. Cir. Jan. 19, 1998) (enjoining the enforcement of regulation which exceeded the Corps of Engineers' grant of authority under the Clean Air Act). *Haitian Centers Councils, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (agency actions that do not fall within the scope of statutory delegation of authority are ultra vires and must be invalidated by reviewing courts); *see also, e.g., National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C. Cir. 1987) (a fee waiver or reduction must "primarily benefit the public" and "[w]hen furnishing requested information is likely to provide both public and private benefits, the agency must determine which benefit is primary").

The Office of Management and Budget Guidelines, promulgated pursuant to FOIA, make clear that in determining whether disclosure is in the commercial interest of the requester, the proper emphasis is on the *use* of the documents, *not* the identity of the user:

> As opposed to the other fee categories created by the amendment, inclusion in the [commercial use category] is determined not by the identity of the requester, but the use to which he or she will put the information obtained. Because "use" is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for commercial use.

Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (1987); *See also* 132 Cong. Rec. H 9455 (Oct. 8, 1986) ("Any requester, regardless of its identity or status under other provisions of the FOIA can qualify for a fee waiver. Even a commercial requester can qualify for a fee waiver if the standard is met. . . .").

The district court completely overlooked this fundamental distinction, which the Second Circuit never reached. Had the Court focused on the statutory language, it seems clear the fee-waiver denial could not have been justified on this ground.

The fact that Ludsin is a commercial entity and had a pecuniary interest in performing the contract successfully did not render him categorically ineligible for a fee waiver. Ludsin sought the appraisals in order to widely and publicly disseminate them over Bloomberg,[8] primarily to accomplish the SBA's stated objective of aggressively marketing its COLPUR portfolio. This use was unquestionably in the public interest, and not primarily in Ludsin's commercial interest:

> The republication or dissemination of government information by a private concern is in the public interest just as much as the original distribution by the agency that prepared the information. The public benefits directly from broader availability of the information. In addition, the private dissemination actually saves the government effort and money that would otherwise be expended in providing the information to the public. In short, therefore, dissemination of information to the public is not intended to be a commercial use under the bill.

132 Cong. Rec. H. 9455 (Oct. 8, 1986).

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8. Thus, Ludsin was akin to a representative of the news media, which may only be charged a reasonable amount for document duplication pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Thus, Ludsin's status as a commercial entity did not mandate the denial of Ludsin's fee waiver request. This important matter of public interest should be settled by this Court to make clear that agencies may not deny publicly beneficial fee waivers to government contractors on the basis that the contractor will also benefit, and to otherwise provide agencies with guidance on the appropriate standards to be applied in balancing the public's interest against any private interest.

II.

THE SECOND CIRCUIT APPLIED AN UNDULY DEFERENTIAL STANDARD OF REVIEW TO THE SBA'S FEE WAIVER DETERMINATION.

A second, independent reason why this Court should issue a writ of certiorari lies in the standard of review applicable in the courts to FOIA actions. Clarification and precision as to the applicable standard is a matter of concern to federal jurisprudence, especially in view of the number of FOIA requests that come through the federal system annually. In 1997, the Department of Justice alone received more than 103,000 FOIA requests.[9]

FOIA provides:

> [in] any action by a requester regarding the waiver of fees . . . , the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

5 U.S.C. § 552(a)(4)(A)(vii). The purpose of this provision "is to allow the courts to exercise *independent* judgment on the issue

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9. U.S. Dep't of Justice, Dep't of Justice Annual FOIA Report to Congress — 1997 (last modified June 2, 1998) <http:// www.usdoj.gov/oip/annual_report/1997/foia.htm>.

of whether a requester is entitled to a fee waiver." 132 Cong. Rec. H. 9455 (Oct. 8, 1986) (emphasis added). *Cf. Department of Air Force v. Rose,* 425 U.S. 352, 379 (1976) ("Congress vested the courts with the responsibility ultimately to determine 'de novo' [disputes over FOIA exemptions] in order to constrain agencies from withholding nonexempt matters.").

Although the Second Circuit stated correctly that it was reviewing the matter de novo, its summary affirmance of the district court's grant of summary judgment casts doubt as to what standard the Court was applying, or what it understood "de novo" to mean. And, while the Second Circuit at least articulated the proper standard of review, the Seventh Circuit has held that an "agency's finding that a fee waiver does not satisfy the public interest standard will be upheld unless the finding is arbitrary or capricious." *McClain v. United States Dep't of Justice,* 13 F.3d at 220-21. Thus, although not the subject of discussion or analysis in the Second Circuit's Summary Order, there appears in fact to be a split in the Circuits on this question.

In light of the "roadblocks and technicalities which have been used by various Federal agencies to deny waiver or reductions of fees under the FOIA," *McClellan,* 835 F.2d at 1284, the Supreme Court should confirm the importance of rigorous and thorough de novo review by courts reviewing the denial of fee waivers, and dispel any notion that agency fee waiver decisions are entitled to a deferential standard of review, as the Seventh Circuit has held.

The Second Circuit held that

> [f]or the most part, Ludsin's submissions to the SBA merely paraphrased the language of the FOIA fee waiver provision, and such conclusory statements do not satisfy the statute.

(*citing Sloman v. United States Dep't of Justice*, 832 F. Supp. 63, 67-68 (S.D.N.Y. 1983)). (App. A at 4a.) As an initial matter, Ludsin's submissions were far from conclusory paraphrases of the statutory language. For example, in addition to the correspondence between the parties, on April 3, 1996, Ludsin submitted a six-page memorandum to the SBA outlining in detail the reasons that the public dissemination of the appraisals on Bloomberg would be in the public interest, and explaining why the disclosure was not primarily in Ludsin's commercial interest.[10]

Even assuming that Ludsin's fee waiver request was conclusory in nature (which it was not), unlike the Second Circuit, Courts of Appeals in other circuits have recognized that an agency may not infer a lack of public interest when circumstances "clarify the point of the request." *McClellan*, 835 F.2d at 1285. *See also Larson v. Central Intelligence Agency*, 843 F.2d at 1483. Relying on *McClellan*, the district court in *Pederson* held that the Resolution Trust Corp. could not feign ignorance of the specific reasons for the plaintiffs' fee waiver request where the RTC acknowledged its familiarity with the circumstances surrounding the request: "[I]t is apparent that defendants knew, or should have known, who plaintiffs were, what they wanted, and why." 847 F. Supp. at 855 (citation omitted).

Here too, the SBA, as the owner of the COLPUR properties and a party to the contract, was well aware of the reasons for Ludsin's request and the attendant public benefit. Indeed, as discussed above, the public benefit of making the appraisals available was recognized by the SBA in determining to make the same information available on the Internet and in previously making similar information available to Ludsin. (App. C at 26a.)

10. The SBA inexplicably failed to submit this memorandum as part of the administrative record and the district court failed to accept Ludsin's proffer of this document, among others, in connection with the motion for summary judgment. The Second Circuit did not address the district court's failure to consider this and other documents.

In summarily rejecting Ludsin's claims, it is evident that the Second Circuit failed to conduct the independent de novo review required by the statute. The Second Circuit did not engage in any analysis, weighing or balancing of the evidence contained in the administrative record below. Rather, like the district court, the Second Circuit appeared to apply a presumption that the SBA was correct in concluding that the appraisals were not likely to contribute to the public's understanding of the SBA's operations and activities "since [they] pertain exclusively to the description and value of property." Similarly, although the Second Circuit did not reach the issue, the district court appears to have "rubber-stamped" the SBA's conclusion that Ludsin's private interest outweighed the public's.

At a minimum, the administrative record -- including the SBA's own admissions -- raised issues of fact concerning the public interest in the disclosure of the appraisals that should not have been decided on summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (holding that summary judgment is only proper if there is no genuine issue as to any material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-43 (1986) ("at the summary judgment stage the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

Under the circumstances, the Supreme Court should take the opportunity to resolve the apparent conflict among the circuits, with regard to the proper standard, and correct the Second Circuit's action which clearly offends the applicable standard.[11]

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11. Should Ludsin prevail, reasonable attorney fees and other litigation costs should be assessed against the SBA. 5 U.S.C. § 552(a)(4)(E).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be granted and a writ of certiorari issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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